

Ng Poh Choo v Perwira Indra Sakti Sdn Bhd (in liquidation)

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HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-1250-10 OF 2012
 PRASAD ABRAHAM J
 10 JANUARY 2014

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Companies and Corporations — Winding up — Liquidator — Creditor's right to set-off judgment sum — Failure to file proof of debt — Whether creditor could exercise right of set-off

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The plaintiff had entered into a sale and purchase agreement with the defendant company, which had since gone into liquidation. When the plaintiff obtained a judgment against the defendant, it attempted to use the judgment sum to set-off from the balance of the purchase price due under the SPA. It was the plaintiff's contention that based on the set-off the purchase price would be deemed paid. However, the plaintiff as the creditor had not filed a proof of debt with the liquidator. The liquidator of the defendant company submitted that if the plaintiff failed to file a proof of debt, it would be precluded from raising a set-off. The parties agreed that as the issues involved in the present case were questions of law, without the relevant facts being in dispute, the same could be disposed of by way of an application under O 14A of the Rules of Court 2012.

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Held, dismissing the plaintiff's application with no order as to costs:

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- (1) As the plaintiff had not filed the proof of debt, the liquidator was not in a position to admit or reject the debt due from the defendant to the plaintiff in the form of the judgment sum. The plaintiff was not a creditor who could exercise his right of set-off under s 41 of the Bankruptcy Act, as the provision did not apply to the instant case. In the circumstances the plaintiff was not a creditor for the purposes of enforcing its claim against the defendant (see para 7).

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[Bahasa Malaysia summary]

Plaintif telah memasuki perjanjian jual beli dengan syarikat defendan, yang mana telah dibubarkan. Apabila plaintif telah memperolehi perintah terhadap defendan, ia cuba untuk menggunakan jumlah penghakiman untuk set-off daripada baki harga belian di bawah SPA. Ia adalah perbalahan plaintif bahawa berdasarkan set-off harga belian akan dianggap telah dibayar. Walau bagaimanapun, plaintif sebagai pemiutang tidak memfailkan bukti hutang dengan pelikuidasi. Pelikuidasi syarikat defendan mengemukakan bahawa jika plaintif gagal memfailkan bukti hutang, ia akan dihalang daripada membangkitkan set-off. Pihak-pihak bersetuju bahawa isu-isu yang terlibat di dalam kes ini adalah persoalan undang-undang, tanpa fakta berkaitan yang

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- A dipertikaikan, perkara yang sama boleh dilupuskan melalui suatu permohonan di bawah A 14A Kaedah-Kaedah Mahkamah 2012.

Diputuskan, menolak permohonan plaintif tanpa perintah untuk kos:

- B (1) Memandangkan plaintif tidak memfailkan bukti hutang, pelikuidasi bukan dalam kedudukan untuk menerima atau menolak hutang yang perlu dibayar oleh defendan kepada plaintif dalam bentuk jumlah penghakiman. Plaintif bukan seorang pemiutang yang boleh menggunakan haknya terhadap set-off di bawah s 41 Akta Kebankrapan,
- C yang mana peruntukan itu tidak terpakai bagi kes ini. Dalam keadaan-keadaan itu plaintif bukan seorang pemiutang untuk tujuan menguatkuasakan tuntutan terhadap defendan (lihat perenggan 7).]

Cases referred to

- D *National Wholemeal Bread & Biscuit Company, Re* [1892] 2 Ch 457, Ch D (refd)
Quantrovision Pte Ltd (In liq), Re (1982) 39 ALR 146; (1982) 61 FLR 214, SC (refd)

E Legislation referred to

Bankruptcy Act 1967 s 41
Companies (Winding Up) Rules 1972 rr 91, 92, 93, 94, 95, 96, 97, 98, 99, 100
Rules of Court 2012 O 14A

- F *HC Tan (HC Tan & Zahani) for the plaintiff.*
Izabella E Silva (Iza Ng Yeoh & Kit) for the defendant.

Prasad Abraham J:

- G [1] In this matter, counsel for both the plaintiff and defendant had agreed to dispose of the same by way of an application under O 14A of the Rules of Court 2012 as the questions posed to court were questions of law and the relevant facts were essentially not in dispute. The application was filed by the defendant
- H (encl 7) and Annexure A of encl 7 has the questions of law to be posed to court. An affidavit in support has been filed encl 8, written submissions have been tendered, and oral submissions were heard on 27 September 2013, wherein I reserved judgment till today.
- I [2] Enclosure 10 contains the documents relevant to the said application and the agreed facts are found in encl 9, I propose to deal with question two first, and then proceed to question one. It must be noted that with regards to the judgment sum obtained by the plaintiff in the Kuala Lumpur Sessions Court for RM78,325, the plaintiff will first have to file a proof of debt in this regard

and when dealing with proof of debts, the relevant provisions of the company winding up rules apply and this has to be done, before the question of set-off can be raised. A

[3] In essence, the plaintiff argues that by virtue of the judgment it has obtained against the defendant, it is entitled to set-off the judgment sum from the balance purchase price due under the sale & purchase agreement and thereafter the purchase price would be deemed paid and the plaintiff is entitled by virtue of being the beneficial owner of the unit entitled to have the same transferred to the plaintiff. Rules 91–100 of the Companies (Winding Up) Rules 1972 provide the procedure by which a proof of debt ought to be filed. It is also to be noted that the court in dealing with these rules, is a Winding Up Court and not in its general jurisdiction. B C

[4] Before the issue of set-off (if any) is to be dealt with by the liquidator as the Winding Up Rules provide, the plaintiff as the creditor must file its proof of debt with the liquidator. If the plaintiff fails to file such a proof of debt, then the plaintiff would be precluded from raising a set-off. I refer to the decision in the English High Court in *Re National Wholemeal Bread and Biscuit Company* [1892] 2 Ch 457 where it was held: D E

A liquidator, when examining a proof of debt with a view to its admission or rejection, is entitled also to examine a set-off to such proof, if it is a matter of account, in order to arrive at the amount, if any for which the proof is to be allowed.

And I also quote from the judgment of Vaughan William J: F

I hold that for the purposes of today the set-off is admissible upon the examination of the proof by the liquidator for the purposes of the account which he has to take in order to arrive at the amount, if any, for which the proof is to be admitted.

The application was then heard, and the proof was admitted, subject to liberty given to the liquidator to apply to expunge the proof, if so advised, in case anything further should come to the liquidator's knowledge. Following the practice in bankruptcy, the Applicant's costs (not of the proof, but of the application only) where ordered to be paid out of the assets of the company. G

[5] I also make reference to the decision of a decision of the Supreme Court of the New South Wales reported in *Re Quantrovision Pte Ltd (In liq)* Federal Law Reports (1982) 39 ALR 146; (1982) 61 FLR 214 and to the judgment of Powell J and I quote: H

It is, however, necessary for me to determine the applicability of the rule in relation to proofs of debt in the winding up of an insolvent company. As I have earlier recorded, the basis of this aspect of the rule is that what is in issue are the rights between the person claiming and the rights of the general body of creditors as represented by the trustee; in which case the *trustee is not bound by any estoppels to* I

- A** *which the bankrupt may have subjected himself and may go behind* any judgment (see, for example, *Re Van Laun; Ex parte Chatterton* (23) per Cozens-Hardy MR and per Buckley LJ) The question thus is: is the position of a liquidator identical with that of a trustee in bankruptcy, or is his position so strongly analogous to that of a trustee in bankruptcy that the rule in bankruptcy might properly be applied in relation to the winding up of an insolvent company.

(Emphasis added.)

- C** [6] I make reference also to McPherson *The Law of Company Liquidation*, (4th Ed), at p 569 and I quote:

It is the liquidator who, in the first place, determines whether a proof should be admitted or rejected, and in performing this function the liquidator acts in a quasi judicial capacity, the liquidator is bound to examine every proof lodged, both from the point of view of the grounds of the debt and of any possible right of set-off, and the fact that proof is based on a judgment does not prevent or relieve the liquidator from performing this duty. Where a liquidator is requested to do so by the person submitting a proof of debt or claim, it has been admitted under reg 5.6.47.

- E** [7] As it is not disputed in this case that the plaintiff did not file its proof of debt with the liquidator and it follow the liquidator is not in a position to admit or reject the debt due from the defendant to the plaintiff by virtue of the Kuala Lumpur Sessions Court judgment, the plaintiff is not a creditor who can exercise right of set-off and the provision of s 41 of the Bankruptcy Act do not apply. Going back to the questions posed the court would answer question two in the negative ie the plaintiff is not a creditor for the purposes of enforcing its claim against the defendant. Flowing from this finding the court would answer question one also in the negative.

- G** [8] With regards to question three specific performance being a discretionary remedy and bearing in mind the court could grant damages in lieu of specific performance and taking into account the undue hardship an order for specific performance will cause. In view of the state of the project the court will answer question three in negative. The court will also answer question four and five in the negative in the light of the court answer to question three. It is also to be noted that the owner of the land has not been cited as party.

- I** [9] In the light of the aforesaid the court would therefore dismiss encl 1 but with no order as to costs.

Plaintiff's application dismissed with no order as to costs. A

Reported by Kohila Nesan

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